

No. 22109
22109A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALDEMAR THOMSON, IONE
THOMSON and TRUSTEES OF
AERO SALES CO, dissolved,

Petitioners,

vs.

COMMISSIONER OF INTERNAL
REVENUE,

Respondent.

PETITIONERS' BRIEF IN
PETITION FOR REVIEW

WALDEMAR THOMSON
605 S. Normandie Avenue
Los Angeles, California 90005

In Propria Persona, for
Petitioners

FILED

OCT 9 1967

WM. B. LUCK, CLERK

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JURISDICTION

Jurisdiction is conferred upon this Court by:

1. The residence of petitioners within its jurisdiction.
2. The filing of petitioners' returns within its jurisdiction.
3. By timely filing of Notice of Petition for Review.

4. By Sections 7482 and 7483 of the Internal Revenue Code (USCA 26).

GRAVAMEN OF PETITIONERS' PETITION

I

The ex post facto application of a decision subsequent to impose tax upon punitive damages recovered in a settlement completed in March, 1955 is a violation of the due process clause of the 5th Amendment.

Obear Nester Glass Co.,
20 TC 1102

Untermeyer v. Anderson,
276 U.S. 440;

Nichols v. Coolidge,
274 U.S. 531, 542.

II

The impost of tax upon recovery of capital in amount less than the "basis," is a violation of ruling case law.

Telefilm, Inc.
21 TC 688, 699 (1954).

III

The impost of tax, after refusing to hear an offsetting loss resulting from the very same acts and taken in the same year, is a violation of ruling case law.

Slater v. Commissioner,
356 F.2d 688, 670.

IV

The impost of tax upon "dividends" that are pure "fictions of law" is a violation of ruling case law.

Stout v. Commissioner,
273 F.2d 345, 4th Cir. 12/29/59.

SUMMARY OF SPECIFICATIONS OF ERROR

I

The determination of the Commissioner is wrong on its face and not entitled to any presumption of correctness. At the outset of the trial on December 7 and 8, 1964, it became clear that burden had shifted heavily on Commissioner but was not discharged.

II

Although burden had clearly shifted heavily upon Commissioner early in the trial, the tax court continued to impose burden upon petitioners through TCM 1965-237.

III

The determination of the Tax Court is wrong on its face, is entitled to no presumption of conclusiveness.

IV

Denial of rehearing, denial of motion for reconsideration of said denial, setting cause under Rule 50 and denial of petitioners' Motion on September 14, 1966 was prejudicial error.

V

The facts in Glenshaw Glass case are clearly distinguishable from facts herein. 348 U.S. 426.

VI

The Tax Court avowed prejudice against petitioners.

VII

There are at least two errors of fact in TCM 1965-237.

VIII

Calculations under Rule 50 are wrong.

STATEMENT OF THE CASE

This case revolves around two issues:

ISSUE NUMBER I

The misapprehension of fragmental and incompetent evidence and the misapplication of law to impose tax upon Aero Sales Co. on \$1, 182 proceeds of settlement of two law suits together with the misapplication of Rule 50 to reimpose tax on Thomsons on said \$1, 182 as "dividends."

ISSUE NUMBER II

The misapprehension of facts and the retrospective misapplication of law to impose tax upon Aero Sales Co. on \$11,330.33, allotted to it, and upon T. T. Co. on \$36,356.22, allotted to it, out of a \$47,686.55 settlement; the misapplication of Rule 50 to reimpose tax upon Thomsons on said \$11,330.33 as "dividends"; the misapplication of law to convert said \$47,685.55, recovered as a partial return of a capital loss of \$173,500.00, clearly suffered, into \$48,555.36 of taxable ordinary income.

It was a denial of "due process" to refuse petitioners' motion for rehearing then to set cause for hearing under Rule 50 and preclude petitioners from proof.

Knight Newspapers v. Commissioner,
143 F.2d 1007, 6th Cir. 7/24/44.

ARGUMENT

As stated in Lasky v. Commissioner, 235 F.2d 97, 9th Circuit: "the Tax Court is not a court at all." In petition herein a Court is available to petitioners for the first time.

ISSUE NO. I

As stated in Stout v. Commissioner, 273 F.2d 345, 350, 4th Cir. Dec. 29, 1959. The presumption of correctness is procedural -- but disappears -- when substantial evidence to the contrary is introduced. Respondents' "11th hour discovery" and presentation of fragmental incompetent evidence was overcome by petitioners evidence, RT p. 100 and 101.

Manchester Paper Box v. Commissioner,
89 F.2d 315.

ISSUE NO. II

In Obear Nester Glass Co., 20 TC 1102, 1109, 9/30/53 the court said:

"The real controversy is the extent, if any, to which proceeds of the lump sum settlement is non taxable because it constitutes punitive damages under the treble damage provisions of the anti trust acts. Reasonable stability of the law

makes it highly desirable that recognized
judicial precedents be adhered to."

Obear Nester Glass Co. found two thirds of settlement to be
non taxable punitive damages.

Glenshaw Glass Co.,
18 TC 860;

Wm. Goldman,
19 TC 637;

Highland Farms,
42 BTA 1314;

Raytheon Production,
1 TC 952;

Central R. R.,
79 F.2d 697.

Thus, on the day settlement was completed in March,
1955, punitive damages were non taxable by law established,
over 2 decades, by uniform decision of the courts. On said
established law petitioners were entitled and obliged to rely
in making the settlement. The ex post facto application of a
decision 90 days subsequent is a violation of "due process"
clause of 5th Amendment.

Cohan v. Commissioner,
39 F.2d 540, 545.

He (Cohan) is a different case from that of one who, when he
takes action, has no reason to suppose that any transaction of
the sort will be taxed at all.

Untermeyer v. Anderson,
276 US 440;

109 U. of P. LR 74;
Nichols v. Coolidge,
274 US 531, 542;

Milliken v. U.S.,
75 L. Ed 809, 815;

Blodgett v. Holden,
275 U.S. 142, 147;

Bouie v. The City of Columbia,
378 U.S. 347;

Gray-Limitations of Taxing Power;
1906, Sec. 1828.

In Telefilm Inc., 21 TC 638 (1954) 699 the court said:

"Some basis for allocation is found in the verdict of the jury in the original law suit awarding the company \$250,000 as compensatory damages and \$50,000 as punitive damages. Using this basis as the most reasonable available we find that 1/6 of the net proceeds represented non taxable punitive damages."

By his rulings in Aero v. Columbia the court was bound to instruct the jury and the jury bound to restrict itself to a verdict of return of capital.

Durkee v. Commissioner,
162 F.2d 184, 186;

"But where the settlement represents damages for lost capital rather than lost profits the money received is a return of capital."

Ralph Freeman,
33 TC 330;

However if the recovery received is as a replacement of capital destroyed or injured the money received is a return of capital and not taxable.

Raytheon Prod. Co.,
144 F.2d 110, 113;

Nicholas Mathey,
10 TC 1099 affd 177 F.2d 259;

H. Liebes and Co. v. Commissioner,
90 F.2d 932, 935.

Recovery for injury to capital is never income no matter when collected.

U.S. Safety Car Heating Co.,
297 U.S. 88, 98;

Farmers and Merchants Bank v. Commissioner,
59 F.2d 912, 913;

Strother v. Commissioner,
55 F.2d 626, 632;

This is a Court of Equity as well as a Court of Law.

Collins v. Commissioner,
32 F.2d 753, 754.

"The Statute lacks the provision common to Statutes dealing with fact finding agencies, that the findings of fact shall be conclusive, if supported by evidence. The absence of such provision from the Statute gives some support to the view that the power of review is in equity.

Helvering v. Taylor,
293 U.S. 508.

The tax payer introduced substantial evidence that no tax is due.

CONCLUSION

Considering the above, petitioners respectfully request the Court hold:

1. That \$31,791.03 out of \$47,686.55, was in March, 1955, non taxable punitive damages.
2. That \$15,895.52, out of \$47,686.55, was, in March, 1955, non taxable return of capital.
3. That \$11,330.22 was in 1955 not dividends taxable to Thomsons.
4. That Commissioner has failed to prove that \$1,182.00, in 1954, was ordinary income.
5. That \$1,182.00, in 1955, was not dividends taxable to Thomsons.
6. That Thomsons sustained a loss in 1955 on their Aero Sales Co. stock with no tax credit.
7. That computations under Rule 50 are wrong.

Respectfully submitted,

WALDEMAR THOMSON

CERTIFICATE

I certify that in connection with the preparation of this brief I have examined rules 18, 19 and 39 of the United States Court of Appeal for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated at Los Angeles
California
September _____, 1967.

/s/ Waldemar Thomson

WALDEMAR THOMSON
in Propria Persona

PROOF OF SERVICE

I, Waldemar Thomson, hereby declare under penalty of perjury, that on _____ I served three copies of the brief herein upon respondent by depositing same in the United States mails in a sealed envelope, the postage fully prepaid, addressed to The Honorable Mitchell Rogovin, Assistant Attorney General of the United States, c/o U.S. Department of Justice, Washington, D.C. 20530.

/s/ Waldemar Thomson

Dated at Los Angeles,
California
September _____, 1967.

WALDEMAR THOMSON

APPENDIX A

REFERENCES OF EXHIBITS TO TRANSCRIPT

<u>Exhibit No.</u>	<u>Description of Exhibit</u>	<u>R. T. 12-7-1964 12-8-1964 Page</u>
1.	Petitions 1337-63, 1338-63, 1339-63, 1340-63	5 to 16
2.	Complaint Aero v. Columbia, CA 29419 D. C. S. F.	5 to 16
3.	Amendment to Complaint CA 29419	5 to 16
4.	Second Amendment to Complaint, Aero v. Columbia	5 to 16
5.	Third Amendment to Complaint, Aero v. Columbia	5 to 16
6.	General Release in Aero v. Columbia	5 to 16
7.	Dismissal with Prejudice of Aero v. Columbia	5 to 16
8a.	Aero Income Tax Return 1954	5 to 16
9b.	Aero Income Tax Return 1955	5 to 16
10c.	Walter Thomson Income Tax Return 1953	5 to 16
11d.	Walter Thomson Income Tax Return 1954	5 to 16
12e.	Walter Thomson Income Tax Return 1956	5 to 16
13f.	Ione Thomson Income Tax Return 1953	5 to 16
14g.	Ione Thomson Income Tax Return 1954	5 to 16
15h.	Ione Thomson Income Tax Return 1956	5 to 16
16i.	Walter and Ione Thomson Income Tax Tax Return 1955	5 to 16

<u>Exhibit No.</u>	<u>Description of Exhibit</u>	<u>Page</u>
	Supplemental Stipulation that the Deductions Claimed by Petitioners Thomson as Business Expenses "Were and Are Based on Actual Expenditures."	15, 16, 21
17.	Portions of R. T. Aero v. Columbia Steel, CA 29419	67, 77, 78
18.	Receipt of Revenue Agent Bath for Exhibit #17	67
19.	Photographs of T.T. Co. Plant in Houston	93, 95

